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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

HOSHANG ALIYAR,

Defendant and Appellant.

D055103

(Super. Ct. No. SCD218336)

APPEAL from a judgment of the Superior Court of San Diego County, Leo Valentine, Jr., Judge. Affirmed.

In an information, the San Diego County District Attorney charged Hoshang Aliyar with one count of vehicle theft (count 1: Veh. Code, § 10851, subd. (a)) and one count of receiving a stolen vehicle (count 2: Pen. Code,¹ § 496d). The information alleged Aliyar had been convicted two or more times within the meaning of section 1203, subdivision (e)(4) and that he had a prior strike conviction for purposes of the Three

¹ All further statutory references are to the Penal Code unless otherwise specified.

Strikes law (§§ 667, subds. (b)-(i), 1170.12). Aliyar pleaded guilty to both counts and admitted the allegations.

At the April 29, 2009 sentencing hearing, the court denied Aliyar's motion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) to strike the prior strike conviction and sentenced him to the low term of 16 months in state prison, doubled to 32 months (or two years eight months) under the Three Strikes law. The court stayed imposition of sentence as to count 2 under section 654.

Aliyar appeals his sentence, contending that "given the nonviolent nature of the current offense and the lack of evidence establishing [he] was personally responsible for the theft of the vehicle, imposition of a sentence other than as a three strike defendant was the proper sentence choice." We conclude the court did not abuse its discretion in denying Aliyar's *Romero* motion and thus affirm the judgment.

FACTUAL BACKGROUND²

Sometime between 9 p.m. the night of January 19 and 3 p.m. the afternoon of January 20, 2009,³ Ho Ching Tang's black Honda Civic was stolen from the parking lot at the La Jolla Palms Apartments in University City. When Tang discovered his car had been stolen, he reported the theft to the police. He found broken glass where he had parked the car.

² The following factual background is based on the probation officer's report dated April 29, 2009.

³ All further dates are to calendar year 2009 unless otherwise specified.

On January 21 at around 9:30 a.m. a San Diego police officer observed a black Honda Civic on Cannington Drive and was able to look at the driver as the Honda passed by. A routine records check revealed the car had been stolen. The officer immediately aired a description of the car and its driver to other officers over the radio. The officer turned his patrol car around, but lost sight of the Honda.

A few minutes later, the officer found the car, unoccupied, parked along the curb at 700 Arundel Place. He noticed the front passenger-side window had been broken out, and he found a white cloth glove on the floorboard in front of the driver's seat.

Shortly thereafter, at around 10:00 a.m., two other San Diego police officers responding to the radio call contacted Aliyar in the 4400 block of Charger Blvd., about two blocks from where the stolen Honda was located. The officer who originally saw the suspect driving the car arrived at the scene and positively identified Aliyar as the person he had seen driving the stolen vehicle. The officers arrested and searched Aliyar and found in his front left pocket a white cloth glove that matched the one found in the stolen vehicle.

The officers transported Aliyar to police headquarters, where he was admonished and interviewed. He denied stealing the Honda and denied ever driving it. When asked why he had the white glove, Aliyar said, "I'm like Michael Jackson; I just carry one glove."

DISCUSSION

Aliyar challenges his two-strike sentence under the Three Strikes law, contending that given the nonviolent nature of his current auto theft offense and the lack of evidence

that he was personally responsible for the theft of the vehicle, imposition of a sentence other than as a three-strike defendant was the proper sentence choice. We conclude the court did not abuse its discretion in denying Aliyar's *Romero* motion to strike his prior strike conviction.

A. *Background*

In denying Aliyar's *Romero* motion, the court noted the only intervening offenses following Aliyar's prior strike conviction were two misdemeanors. It expressed concern about Aliyar's history of juvenile delinquency, including offenses related to auto theft in 1993, stating that Aliyar "did not take well to the rehabilitative efforts of the juvenile justice system," he "failed miserably there," and he "didn't do well on probation in adult court."

B. *Applicable Legal Principles*

In *Romero, supra*, 13 Cal.4th at pages 529-530, the California Supreme Court held that section 1385, subdivision (a) (hereafter section 1385(a))⁴ permits a court acting on its own motion and "in furtherance of justice" to strike prior felony conviction allegations in cases brought under the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12).

Although the Legislature has not defined the phrase "in furtherance of justice" contained in section 1385(a), the California Supreme Court has held that this language requires a court to consider both the " "constitutional rights of the defendant, and the

⁴ Section 1385, subdivision (a) provides in part that a trial court "may, either of [its] own motion or upon the application of the prosecuting attorney, and *in furtherance of justice*, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes." (Italics added.)

interests of society represented by the People" ' ' (italics omitted), in determining whether to strike a prior felony conviction allegation. (*Romero, supra*, 13 Cal.4th at p. 530.)

In *People v. Williams* (1998) 17 Cal.4th 148, 161, our high state court explained that, in determining whether to strike or vacate a prior strike allegation or finding under the Three Strikes law "in furtherance of justice" pursuant to section 1385(a), the trial court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes law's] spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies."

In *People v. Carmony* (2004) 33 Cal.4th 367, 371, the California Supreme Court held a trial court's decision not to dismiss a prior strike conviction allegation under section 1385(a) is reviewed under the deferential abuse of discretion standard. *Carmony* explained that "a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Carmony* at p. 377.)

C. Analysis

In opposing Aliyar's *Romero* motion, the People argued that "[h]is criminal history shows that he is a 'revolving door' career criminal who is not outside the spirit of the [Three Strikes] law."

Although Aliyar's current felony offenses of unlawfully taking and driving a vehicle (Veh. Code, § 10851, subd. (a)) and receiving a stolen vehicle (Pen. Code, § 496d) are, as he points out, nonviolent in nature, his 1997 prior strike conviction was

for robbery (Pen. Code, § 211), which he committed in August 1996 when he exited a car, accosted a 12-year-old boy who had left a Bank of America branch carrying a bank bag, placed the boy in a headlock, ripped the bag from his hands, and left the scene after jumping back into the car. His claim on appeal that the robbery victim was "[not] injured in any way" demonstrates a lack of concern or understanding about the injurious emotional impact of such a criminal act on the victim, particularly one so young.

Significantly, Aliyar committed the robbery less than a year after he pleaded guilty in late 1995 to receiving a stolen vehicle. That prior offense, like the robbery, resulted in a prison term. His punishment for those prior offenses obviously did not deter him from committing the current felony offenses.

The record shows that during the period of time between his 1997 robbery prior strike conviction and his current 2009 felony convictions, Aliyar was arrested in late 2008 and charged with misdemeanor driving with a suspended license (Veh. Code, § 14601.1);⁵ and in late 2001 he was convicted of misdemeanor driving while under the influence of alcohol (Veh. Code, § 23152, subd. (a)).

Aliyar acknowledges his substantial juvenile criminal history, but asserts the "court's use of these offenses that predated the current offense by over 15 years was not really a valid consideration in determining whether to strike a serious prior conviction" because "[t]hose offenses were old." However, as Aliyar also acknowledges, those offenses included taking a vehicle without the owner's permission (§ 499) and later grand

⁵ This matter was unresolved as of the time of sentencing in the instant case.

theft involving the taking of a firearm (§ 487, subd. (d)), apparently from a vehicle. Aliyar's history of committing criminal acts in connection with stolen vehicles thus extends back to his youth.

Aliyar does not challenge the court's express finding that he "did not take well to the rehabilitative efforts of the juvenile justice system," that he "failed miserably there," and he "didn't do well on probation in adult court."

We conclude the nature of Aliyar's current offenses, his prior adult and juvenile criminal history, and his unwillingness to conform his behavior to the requirements of the law despite the efforts of the criminal and juvenile justice systems to rehabilitate him, all indicate he should not be deemed "outside" the spirit of the Three Strikes law. Accordingly, we also conclude the judgment should be affirmed as the court did not abuse its discretion in denying his *Romero* motion.

DISPOSITION

The judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

McINTYRE, J.

O'ROURKE, J.